FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 18 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 346.

MRS. GLADYS LEITH HOLMES,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY et al.,
Respondents.

BRIEF

Of Respondent, Continental Casualty Company in Opposition.

REID B. BARNES,
Exchange Security Bank Building,
Birmingham, Alabama,
Counsel for Respondent, Continental Casualty Company.

JAMES A. SIMPSON,
WILLIAM L. CLARK,
LANGE, SIMPSON, ROBINSON & SOMERVILLE,
Of Counsel.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement of the case	2
Argument	12
Preliminary statement	12
Case primarily involves factual questions	14
Questions presented in petition were not raised in lower court	15
Scintilla rule rejected by Federal Courts	15
Decision and order below not in violation of petitioner's rights	21
Conclusion	26
Certificate	27
Appendix A	29

Cases Cited.

Ala. Great So. R. R. Co. v. Bishop, 265 Ala. 118, 89 So. 2d 738, 743 20

Byrd v. Blue Ridge Cooperative, 356 U. S. 525 ..... 19, 24, 26

Cooper v. Brown, Third Circuit, 126 F. 2d 874 20

Dick v. New York Life Ins. Co., 359 U. S. 437 ..... 16, 20

Diederick v. American News Co., Fourth Circuit, 128 F. 2d 144 20-21

Erie R. Co. v. Tompkins, 304 U. S. 64 ..... 24, 26
Ettelson v. Metropolitan Life Ins. Co., 137 F. 2d 62, 65 21
Galloway v. United States, 319 U. S. 372 25
Gorham v. Mutual Ben. Health & Accident Ass'n. of Omaha, 114 F. 2d 91 (certiorari denied 312 U. S. 688) 19
Guaranty Trust Co. v. York, 326 U. S. 99 23
Gunning v. Cooley, 281 U. S. 90 17
Herron v. Southern Pacific Company, 283 U. S. 91 ..... 18, 24, 26
Martin v. Burgess, 82 F. 2d 321, 324 15
Montgomery Ward & Co. v. Duncan, 311 U. S. 243 24
Pennsylvania RR. Co. v. Chamberlain, 288 U. S. 333, 341 15
Pollard v. Rogers, 234 Ala. 92, 173 So. 881 12
Schuylkill & D. Improv. Co. v. Munson, 14 Wall. 442, 448 15
South Carolina Aspargus G. Ass'n. v. Southern Ry. Co., 46 F. 2d 452 16
White v. New York Life Ins. Co., 145 F. 2d 504 16

Statutes Cited.

General Acts of Alabama, 1953, page 247 ..... 2, 29
Title 7, Section 277, Code of Alabama, 1940 ..... 2, 18
Title 28, Section 66, Code of Alabama of 1940 ..... 2, 29
28 U. S. C. A., Section 1652 (formerly Section 725) ... 26
28 U. S. C. A., Section 2106 ..... 12, 13

Textbook Cited.

Morgan, Choice of Law Governing Proof, 58 Harvard Law Review 153, 178 (1944) 16, 17, 18

Rule Cited.

Rule 50 (b) 12, 23, 24, 27

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 346.

MRS. GLADYS LEITH HOLMES,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY et al.,
Respondents.

BRIEF

Of Respondent, Continental Casualty Company in Opposition.

OPINIONS BELOW.

There was no opinion of the District Court. The opinion of the Court of Appeals is reported in 266 F. 2d 269.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

(Restatement.)

QUESTION 1.

Was the Court of Appeals required to recognize the scintilla rule prevailing in the state courts of Alabama in considering the propriety of directing the District Court to enter a judgment in favor of the defendant, where the case involved substantive law of Alabama?

QUESTION 2.

Is the evidence in the case sufficient to support the verdict of the jury and does the Seventh Amendment of the Constitution forbid the Court of Appeals from re-examining the facts for the purpose of determining whether the District Court erred in refusing the motion for a directed verdict requested pursuant to Rule 50 (b)?

STATUTES INVOLVED.

Title 7, Section 277, Code of Alabama, 1940, is involved and provides that "No more than two new trials can be granted to the same party in any cause."

General Acts of Alabama, 1953, page 247, and Title 28, Section 66, Code of Alabama of 1940, are involved, and the provisions thereof are set out in Appendix A.

STATEMENT OF THE CASE.

The petitioner, a resident of Alabama, sued respondent in the United States District Court for the Northern District of Alabama, claiming (R. 2-5) that a policy of insurance issued by the respondent on or about February 17, 1956, insuring the petitioner's husband against loss

of life by riding as a passenger in an aeroplane, was, by oral contract or agreement of an agent of the respondent, acting within the line and scope of his employment, extended to cover the insured while flying as a pilot; that subsequent to such oral contract or agreement, the insured was killed while flying a private passenger aeroplane.

The respondent denied that the agent who negotiated with the deceased had authority to change or extend the written policy so as to effect, by oral contract or agreement, coverage as to a hazard not included in the policy, and which was specifically excluded therefrom.

The agent, W. T. Musgrove, and his partner, W. R. Cadenhead, were impleaded as third parties defendant on the theory that the agent exceeded his actual authority and would be liable to the respondent for any judgment obtained by the petitioner based upon a finding that the agent bound the respondent on account of apparent or ostensible authority.

The Court submitted to the jury as between the plaintiff (petitioner) and the defendant (respondent) the issues as to whether the agent negotiating with the insured had authority, either actual or apparent, to make the alleged oral agreement covering the insured while flying as a pilot and whether the insured was estopped or precluded from asserting that the agent had authority to make the alleged agreement. As to the issues between the third party plaintiff, Continental Casualty Company, and the third party defendants, the Court instructed the jury that if the jury should make a finding in favor of Mrs. Holmes, based upon apparent authority of the agent, and not upon actual authority of the agent to make the alleged oral agreement, then the jury should also find in favor of the third party plaintiff in the same amount as that awarded the plaintiff.

A photocopy of the policy involved in this case is contained in the record, pages 45-48, and the original (Plaintiff's Exhibit 1) was among the numerous exhibits transmitted to the Court of Appeals under order (R. 815-816) of the District Court. Mrs. Holmes was named as beneficiary in the policy, which was in a form complying with the provisions of General Acts of Alabama, 1953, page 247, including the following:

> "Entire Contract; Changes: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Company and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or waive any of its provisions."

The basic question involved in the trial of the case, and on the appeal, was whether the alleged oral agreement, said to have been made by Musgrove on January 3, 1957, and reaffirmed on February 20, 1957, was binding upon the defendant. Although the period from January 3, 1957 to February 21, 1957, is significant, it becomes necessary, in view of the questions hinging upon the authority, either actual or apparent, of the agent, for the Court to consider the circumstances, under which the policy was issued and the transactions between the Company and the agent, after the issuance of the policy, in order to gain a clear understanding of the facts which were considered by the Court of Appeals in reaching the conclusion that the defendant was entitled to have granted its motion for a directed verdict.

For a number of years prior to February 17, 1956, the effective date of the policy issued to Mr. Holmes, the deceased, W. T. Musgrove was engaged in an insurance

business conducted in Florence, Alabama, and he and Mr. Cadenhead were partners in the business during the period important to this litigation. They were agents of various insurance companies writing fire, casualty, life, accident and health insurance.

On February 3, 1956, Oliver Wendell Holmes executed an application for aviation accident insurance on a form provided by Queen Insurance Company of The Royal Liverpool Group (Defendant's Exhibit 1), for which W. T. Musgrove was acting as agent. This application, together with a similar application of James Luther Culver, was forwarded to the Atlanta, Georgia, office of The Royal Liverpool Group and there considered by its representative, Mr. Jerry Smith. In view of the fact that Queen Insurance Company already had considerable exposure under a policy covering the aircraft identified in the applications, Mr. Smith undertook to place the insurance applied for, or a portion thereof, with another company. Mr. Herbert V. Holland, Jr., a representative of Continental Casualty Company, assigned to the Aviation-Travel Accident Division of the Atlanta branch office, was contacted by Mr. Smith, who furnished Mr. Holland with the information contained in the applications of Mr. Holmes and Mr. Culver. After some further discussions between Mr. Holland and Mr. Smith, Mr. Holland wrote a letter to Mr. Musgrove under date of February 23, 1956 (Plaintiff's Exhibit 4), advising that Continental Casualty Company was holding on binder aviation accident coverage for Holmes and Culver. This letter (R. 42) recited that the two men named were covered in the sum of $50,000.00 "while riding as a passenger" in certain specified aircraft. The annual premium quoted was $1.35 per thousand.

With the letter of February 23, 1956 (set out in the margin of the opinion of the court below, 266 F. 2d at page 272), Mr. Holland forwarded to Mr. Musgrove appli-

cations on forms of Continental Casualty Company which were to be executed by Mr. Holmes and Mr. Culver. In this letter Mr. Holland called to Mr. Musgrove's attention that certain additional information, not called for by the form applications, would be needed if broader aircraft coverage was desired by the applicants.

The application of Mr. Holmes (Defendant's Exhibit 2) was executed on February 27, 1956, and forwarded to Mr. Holland with letter of Mr. Musgrove dated February 29, 1956 (Defendant's Exhibit 3). In this letter Mr. Musgrove advised that the coverage mentioned in Mr. Holland's letter of February 23, 1956 (that is, coverage while riding as a passenger) was broad enough (R. 470) to meet the wishes of Mr. Holmes.

Neither Mr. Holland nor Mr. Musgrove considered that the latter was an agent of Continental Casualty Company prior to the issuance of the policy, effective February 17, 1956, and Mr. Holland knew at the time he received Mr. Musgrove's letter of February 29, 1956, that, Mr. Musgrove was not a licensed agent of Continental Casualty Company (R. 473-475). When Mr. Holland discovered on March 9, 1956, that the policies applied for by Mr. Holmes and Mr. Culver had been forwarded directly to Mr. Musgrove by the Policy Writing Section of the Atlanta branch office, without countersignatures by a licensed resident agent, he phoned Mr. W. R. Cadenhead and subsequently wrote him requesting that the policies be returned to Atlanta (R. 478). There was some delay in returning the policies to Atlanta for proper countersignatures by a resident agent licensed by the State of Alabama and Mr. Holland suggested to Mr. Cadenhead that the problem be solved by Continental Casualty Company procuring an Alabama license for Mr. Musgrove. As will appear from the facts hereinafter set forth, no agency relationship between Musgrove and Continental Casualty Company would

have come into existence but for the problem arising in connection with the procuring of countersignatures by a licensed resident agent on the policies of Holmes and Culver.

Some of the negotiations leading to the issuance of an Alabama license to Mr. Musgrove are reflected in a letter from Holland to Musgrove, dated April 11, 1956 (Third Party Defendants' Exhibit 1), a letter from Musgrove Insurance Agency to Holland, dated May 3, 1956 (Defendant's Exhibit 18) and Holland's reply under date of May 7, 1956 (Third Party Defendants' Exhibit 2—appearing in the margin of the opinion, 266 F. 2d at page 272).

Plaintiff's Exhibit 13 reflects that an Alabama resident agent's license was requested and issued to William T. Musgrove in May, 1956. The form of the Certificate of Authority issued by the Department of Insurance—State of Alabama, is shown by Plaintiff's Exhibit 5.

The policies insuring Holmes and Culver, having been returned to Atlanta, pending the procurement of a license for Musgrove, were sent back to Musgrove Insurance Agency after the taking of all steps necessary to the issuance of a license.

No written agency contract was entered into between Musgrove or Cadenhead and Continental Casualty Company (R. 112). Musgrove Insurance Agency was placed upon the mailing list of the Aviation-Travel Accident Division of the Atlanta branch office of Continental Casualty Company and received from time to time certain bulletins and advertising material published by Continental Casualty Company. With the exception of such bulletins and advertising matter, there was no correspondence between Musgrove Insurance Agency and Continental Casualty Company after the license was procured for Musgrove and prior to January 4, 1957 (R. 146). Under date of January

4, 1957, Mr. Cadenhead wrote Continental Casualty Company a letter which is set out in the opinion of the Court of Appeals (266 F. 2d at page 274).

The next contact between Musgrove Insurance Agency and Mr. Holland was on Monday, February 25, 1957, on which date Mr. Cadenhead personally carried to Mr. Holland in the latter's Atlanta office an application (Defendant's Exhibit 6) and a Pilot History (Defendant's Exhibit 7), both of which purported to have been signed by Mr. Holmes on February 20, 1957. The application purporting to have been signed by Mr. Holmes on February 20, 1957 (Defendant's Exhibit 6) contains the following question and answer:

"12. Do you understand and agree that no insurance will be effected until the policy is issued? Yes."

A photocopy of Defendant's Exhibit 6 is found on page 51 of the record.

On this occasion Mr. Cadenhead informed Mr. Holland that Mr. Holmes had been killed on February 21st while piloting an airplane. The matter was discussed by Mr. Holland and Mr. Cadenhead and the latter carried back to Florence the application and Pilot History referred to.

Mr. Musgrove, called as a witness in behalf of the plaintiff, testified concerning a telephone conversation had with Mr. Holland in February or March of 1956, during which Holland asked permission to apply for a resident agent's license for Musgrove and Musgrove gave his permission. The details of this conversation, as testified to by Musgrove, are set out in the opinion below (266 F. 2d 273-274).

With reference to Musgrove's statement that Holland wanted him to be a "full agent" for the Aviation Accident Division of Continental Casualty Company and receive a

"full agency commission" the Court of Appeals stated as follows:

> "This is appellee's strongest evidence. However, this conversation took place prior to the issuance to Musgrove of a license by the State Department of Insurance at a time when Musgrove was not an agent of the Company. The term **'full agent' can only be reasonably construed as bringing into existence the status of principal and agent** of employer and employee, **not as conferring general agency powers** upon Musgrove." (Emphasis ours.) 266 F. 2d 278.

It was following this conversation, and some time in May, 1956, that Musgrove received from the Insurance Department of the State of Alabama a license as a resident agent for the Continental Casualty Company (R. 205). After the conversation regarding the license the policies (issued to Holmes and Culver) were sent back to Musgrove's office. Mr. Musgrove stated that these policies accompanied Mr. Holland's letter of May 7, 1956, directed to Mr. Cadenhead (R. 206-207). The letter referred to is identified as Third Party Defendants' Exhibit 2, and is set out in the margin of the opinion below (266 F. 2d, pages 272-273).

With reference to the license from the Insurance Department, the Court of Appeals stated:

> "Summarily, this certificate 'is only evidence of the existence of the agency in some form'." (266 F. 2d 278).

There was introduced and identified as Plaintiff's Exhibit No. 13 a request on a printed form from the Atlanta branch office to the general office in Chicago to license Musgrove as an individual resident agent. In this form request it was directed that certain information be furnished under the paragraph entitled "Applicant will re-

port business through." One page of Plaintiff's Exhibit 13 is set out in the opinion at page 279.

With reference to Plaintiff's Exhibit 13, the Court of Appeals stated:

> "We agree with appellant that it is without reason to interpret Plaintiff's Exhibit No. 13 as affording the basis of a finding that Musgrove was a general agent of the Company." (266 F. 2d 280).

The Court of Appeals, in discussing Plaintiff's Exhibit No. 13, failed to make reference to a card attached to and made a part of said exhibit. This card had places in which to indicate whether Musgrove was licensed as a "resident," "non-resident," "general agent," or "local agent." The card showed that he was licensed as a "resident" agent and was to submit business through the Atlanta branch office.

The Court of Appeals gave consideration to other factual matters insisted upon in behalf of Mrs. Holmes in establishing that Musgrove was a general agent of the Company. These other matters are referred to in the opinion on page 280.

The Court of Appeals considered only two of the Specifications of Error, in view of its determination that the District Court erred in refusing the defendant's motion for a directed verdict on the plaintiff's claim and in overruling the defendant's motion for a judgment notwithstanding the verdict.

The District Court, recognizing that the substantive law of Alabama applied (R. 731), instructed the jury that the burden was upon the plaintiff to reasonably satisfy the jury of the material allegations of the complaint (R. 733). The Court of Appeals also recognized that the substantive law of Alabama applied, as indicated by its reference to

the Alabama case law dealing with the power of an agent to bind the insurer and setting forth the test by which general agency is determined. In considering the evidentiary effect of the certificate or license issued to Musgrove by the Superintendent of Insurance of the State of Alabama, the Court of Appeals looked to and applied the law of Alabama.

After giving careful consideration to all of the evidence, including numerous original exhibits forwarded under order of the District Court, the Court of Appeals concluded that Musgrove was merely a "local," or "resident" agent, having the powers normally conferred on a "soliciting" agent. The Court of Appeals, applying the law of Alabama with respect to the authority of an agent to bind the company, held that Musgrove had neither actual nor apparent authority to bind the respondent under the alleged oral contract or agreement, and that the District Court should have granted the respondent's motion for a directed verdict.

The record shows that no form blank policies were in Musgrove's possession prior to the death of Mr. Holmes and it was undisputed that neither Mr. Holland nor any other employee of Continental knew of the alleged agreement until after Mr. Holmes' death. It was also undisputed that Mr. Holmes paid only the annual premium of $67.50 for the $50,000.00 policy covering flying as a **passenger** and that the company never received any portion of the premium of approximately $375.00 which would have been charged to cover the hazard of flying as a **pilot.**

ARGUMENT.

Preliminary Statement.

Some refinements of the questions presented in the Petition should be made and some differences between the procedure followed by the state courts of Alabama and Federal procedure should be kept in mind in order to avoid confusion as to questions presented in the Petition and the points discussed herein.

Question 1, as set forth in the Petition, has been restated on page 2 hereof for the purpose of focusing the Court's attention upon the fact that the real question involved is not whether the scintilla rule should have been given consideration in determining whether the verdict was supported by the evidence, but whether such rule should have been recognized by the Court of Appeals in giving effect to the procedure provided for by Rule 50 (b) and 28 U. S. C. A., Section 2106.

When a jury verdict is reviewed by the Supreme Court of Alabama, under the procedure provided for by state law, and the Court finds that the verdict is without evidentiary support, the case must be remanded for a new trial. However, in making such a review, the scintilla rule has no application. In **Pollard v. Rogers**, 234 Ala. 92, 173 So. 881, the Supreme Court of Alabama said:

> "It is the rule that where the verdict is contrary to the great preponderance of the evidence, defendant, on due motion, is entitled to a new trial, though the trial court was not in error in declining the affirmative charge. The scintilla of evidence rule does not apply as to the ruling on the motion."

The overriding question involved is whether the District Court could have directed the entry of a judgment,

either before or after the verdict, without violating the plaintiff's alleged right to a jury trial under state law, or whether the order of the Court of Appeals, directing (under the provisions of 28 U. S. C. A., Section 2106) the entry of a judgment for the defendant constituted an invasion of such alleged right.

The respondent insists it is well established that in the trial of civil cases in the Federal courts, including cases where jurisdiction is based upon diversity of citizenship the courts are not bound by state laws which conflict with the duty of the court to determine, before submitting a case to the jury, whether, as a matter of law, there is any evidence upon which a jury can properly find a verdict in favor of the party having the burden of proof; that if the court determines that a verdict against the party moving for a directed verdict would not stand it is not only the right, but the duty of the court to grant the motion.

The respondent concedes that the Court of Appeals should have followed the law of Alabama insofar as such law furnished a test by which to determine whether the agent had the power to bind the respondent under the oral agreement, or whether he had only those limited powers normally conferred upon a "soliciting" agent. The respondent says this was done and that a reference to the opinion of the Court of Appeals will so show.

Question 2, as set forth in the Petition, has been restated for the primary purpose of directing the Court's attention to the fact that under one phase of the question the petitioner is seeking a general review by this Court of the sufficiency of the evidence, and, under the second phase is attempting to assert that the action of the Court of Appeals in directing the entry of a judgment for respondent was in violation of the Seventh Amendment of the Constitution.

The respondent, of course, does not dispute the right of this Court to review the action of the Court of Appeals, but insists that the argument in respect to the constitutional question sought to be raised has been foreclosed by a number of decisions of this Court.

Case Primarily Involves Factual Questions.

When the Petition is stripped of the constitutional or procedural questions, which are either not directly involved or which have been decided adversely to the petitioner, it is apparent that this case presents only factual questions relating to the authority of an agent to bind the principal.

This is not an unusual insurance case, except that it involves a claim by the petitioner (plaintiff) that her deceased husband was insured under an alleged parol rider to a policy of insurance which she asserted afforded coverage as to a risk specifically excluded from the policy.

As the decision of the Court of Appeals was based upon conclusions as to facts peculiar to the particular case, it is difficult to conceive that the decision of the court below can be of particular importance except to the litigants involved herein. As is shown by the opinion of the Court of Appeals, there is no conflict among the decisions as to the legal principles decisive of the questions as to the authority of the agent.

Basically, the case is similar, except from factual standpoints, to numerous other cases involving the authority of an agent to accept risks or bind the company under an oral agreement. However, it is interesting to note that the petitioner has cited no case from Alabama, or any other jurisdiction, which would indicate the Court of Appeals did not reach the correct conclusion in deciding that the evidence was insufficient to show authority, either actual or apparent, of Musgrove to bind the respondent.

Questions Presented in Petition Were Not Raised in Lower Court.

Although it is apparent from the opinion of the lower court that the court applied the substantial evidence test, it nowhere appears that the attorneys for the petitioner argued that a different test should have been applied or that such question was considered by the lower court. In the application for rehearing, which we assume has been made a part of the record sent to this Court, the attorneys for Mrs. Holmes, at page 13 of the application, state the question presented thereunder as follows:

> "The question is whether or not there is any substantial evidence that Musgrove was a general agent."

Scintilla Rule Rejected by Federal Courts.

In conformity with decisions of this Court, the Court of Appeals, Fifth Circuit, has for many years declined to be governed by the scintilla of evidence rule of Alabama. In 1936 the Court of Appeals, Fifth Circuit, stated:

> "The scintilla of evidence rule which prevails in Alabama touching the direction of verdicts does not apply in the Federal courts sitting there." **Martin v. Burgess**, 82 F. 2d 321, 324.

In the Martin case the Court of Appeals cited **Pennsylvania RR. Co. v. Chamberlain**, 288 U. S. 333, 341. In the Chamberlain case this Court stated:

> "The scintilla rule has been definitely and repeatedly rejected so far as the Federal courts are concerned."

In the Chamberlain case this Court cited **Schuylkill & D. Improv. Co. v. Munson**, 14 Wall. 442, 448. In the Munson case this Court stated as follows:

> "Formerly it was held that if what is called a **scintilla** of evidence in support of a case the judge was bound to leave it to the jury, but the recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the **onus** of proof is imposed." 14 Wall. 448.

The rule enunciated in the Munson case in 1871 has been followed uniformly by the Federal courts, even in diversity cases, and the scintilla rule rejected.

According to the treatise by Morgan, **Choice of Law Governing Proof**, 58 Harvard Law Review 153, 178 (1944), cited in **Dick v. New York Life Ins. Co.**, 359 U. S. 437, Alabama and South Carolina are the only states in which the scintilla rule now obtains. As early as 1931 the Circuit Court of Appeals, Fourth Circuit, declared that the scintilla rule (of South Carolina) had never been approved by the Federal Courts. **South Carolina Aspargus G. Ass'n. v. Southern Ry. Co.**, 46 F. 2d 452. In 1944 the Court of Appeals, Fifth Circuit, in **White v. New York Life Ins. Co.**, 145 F. 2d 504, stated, with *respect to the scintilla rule of* Alabama as follows:

> "The rule of practice to the effect that a mere scintilla of evidence is sufficient to require submission to the jury has never obtained in Federal courts."

There is no diversity of opinion in the decisions of the Fourth Circuit and Fifth Circuit, or, for that matter in any of the decisions of the Federal courts, in respect to the scintilla rule.

Since it appears that South Carolina and Alabama are the only two states still adhering to the scintilla rule, a ref-

erence to the cases of the Fourth Circuit and Fifth Circuit will be of particular interest in determining whether there is lack of uniformity in the decisions of the lower courts. The Court of Appeals, Fourth Circuit, states, "What is known as the scintilla rule has never been approved by the Federal courts." 46 F. 2d 452. The Court of Appeals, Fifth Circuit, states, "The rule of practice to the effect that a mere scintilla of evidence is sufficient to require submission to the jury has never obtained in the Federal courts." 145 F. 2d 504, page 509. A reference to the two opinions from which we have quoted discloses that both courts cite **Gunning v. Cooley**, 281 U. S. 90, in which this Court stated that "A mere scintilla of evidence is not enough to require the submission of an issue to the jury."

Unless this Court should determine that the rule of practice still prevailing in the courts of South Carolina and Alabama should be followed in diversity cases pending in the Federal courts sitting in those states, there would seem to be no occasion for this Court to grant the Petition for a Writ of Certiorari.

In the treatise by Morgan, 58 Harvard Law Review, 153, 178, referred to above, the author states the following:

> "*In Alabama, however, the latest decisions declare* that the scintilla rule requires the submission to the jury of a case upon evidence so weak that the trial judge's refusal to grant a new trial after verdict based on that evidence constitutes reversible error. In these circumstances it is obviously impossible to argue that on the facts disclosed by the evidence a right-duty relationship is created by the law of Alabama, or even that Alabama puts the determination of that question in the province of the jury." 58 Harvard Law Review 178.

The author further states:

> "The fact that Alabama is willing to endure the expense, delay and inconvenience involved in submitting to the jury a question to which, as a matter of Alabama law, there can be but one answer can hardly be urged as a reason why the United States district court should commit a similar folly. This was certainly true before the Tompkins case. And it is difficult to believe that, so long as the court is bound to set aside a verdict based on a scintilla, the reasoning of that decision can be tortured into a justification for requiring a federal judge to follow the Alabama practice." 58 Harvard Law Review 178.

The treatise by Morgan refers to an Alabama statute (Title 7, Section 277, Code of Alabama, 1940, providing that "no more than two new trials can be granted to the same party in any cause"), which would complicate the handling of Federal court cases involving substantive law of Alabama. If a Federal judge were required to submit a case to the jury on a mere scintilla, and then set the verdict aside as being contrary to the weight of the evidence, it might become necessary to have three trials of the same case before a final disposition thereof.

The case of **Herron v. Southern Pacific Company**, 283 U. S. 91, very clearly establishes that a Federal court may direct a verdict notwithstanding a state law which would have required the submission of the case to the jury if tried in the state court. In that case the Court collected some of the earlier decisions and stated that a Federal court is not subject to state regulations, whether found in constitutional provisions or in statutes, providing that the Court "shall not direct a verdict, where the evidence is such that a verdict the other way would be set aside." 283 U. S. 95.

In the Herron case, this Court, speaking through Mr. Chief Justice Hughes, stated "the controlling principle

governing the decision of the present question is that the state laws cannot alter the essential character or function of a Federal court." 283 U. S., at page 94.

The Fourth Circuit, in the case of **Gorham v. Mutual Ben. Health & Accident Ass'n. of Omaha**, 114 F. 2d 91 (certiorari denied 312 U. S. 688), interpreted the decision in the Herron case as meaning that in the matter of direction of verdicts, the question must be decided by federal practice and is not one wherein local law or local decisions are binding.

In the recent case of **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525, this Court reversed the Court of Appeals, Fourth Circuit, and set aside its order directing the entry of a judgment. However, in the Byrd case, the Court recognized and reiterated the rule of the Herron case to the effect that state laws cannot be allowed to disrupt or alter the essential character or function of a Federal court.

Although the decision in the Byrd case is relied upon by the petitioner, the reasoning of the Court as applied to the questions therein presented is sufficient authority within itself for denying the Petition herein. The record in the instant case discloses that each of the parties had ample opportunity to present all available evidence material to the issues, and that the Court of Appeals gave careful consideration to each evidentiary point relied upon by petitioner as establishing authority of the agent to bind the respondent.

It is urged by the petitioner that the outcome of the instant case, instituted in a Federal court sitting in Alabama, should be the same as if tried in the state court. Respondent concedes that if the case had been tried in the state court, the case would have been submitted to the jury if the trial judge had concluded that a "gleam"

"glimmer" or "spark" of evidence supporting authority of the agent to make the alleged oral agreement had been adduced. **Ala. Great So. R. R. Co. v. Bishop**, 265 Ala. 118, 89 So. 2d 738, 743. We assume petitioner will concede that a verdict in favor of petitioner, based on no more than a **scintilla**, would have been set aside if returned upon a trial in a court of Alabama. The contention of the petitioner is to the effect that the District Court should be required to submit the case to the jury if it finds a scintilla of evidence which supports the petitioner's theory. The approval by this Court of such a contention would mean that the decisions of the Fourth Circuit and Fifth Circuit, rejecting the scintilla rule of South Carolina and Alabama, are wrong, and that District Courts sitting therein in diversity cases must no longer follow the more reasonable rule which has been accepted uniformly by the Federal courts since the decision in the Munson case, 14 Wall. 442, 448.

In the opinion in the recent case of **Dick v. New York Life Ins. Co.**, 359 U. S. 437, this Court referred to the disagreement among the lower courts as to whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. The cases referred to by the Court in this connection fail to reflect any disagreement in respect to the application of the scintilla rule. The question referred to was left undecided and among the reasons given for not entertaining the question was the fact that the Court of Appeals did not discuss the same. We have pointed out hereinabove that the question as to whether the scintilla rule was binding upon the Court of Appeals was not presented to that Court, and that the attorneys for the petitioner conceded that a different test should prevail.

In the Dick case, **Cooper v. Brown**, Third Circuit, 126 F. 2d 874, and **Diederick v. American News Co.**, ~~Fourth~~ Cir.

Tenth

cuit, 128 F. 2d 144, were referred to as representative cases presenting opposite views as to whether a state or federal test should be applied. A reference to the decisions in these cases discloses that both cases presented questions entirely different from those involved in the instant case. Furthermore, a reference to a later case of the Third Circuit, **Ettelson v. Metropolitan Life Ins. Co.**, 137 F. 2d 62, 65, shows that the Diederick case (Tenth Circuit) is among those cited in support of the statement that, "Well considered federal decisions have held that the division of function between court and jury in a federal court is to be made by federal, not state law." In the Ettelson case, the Court further stated, "This case is another of the instances in which a litigant, in federal court because of diversity of citizenship, has his rights determined by state law, but obtains them by the procedure available in all federal courts."

The record shows that the Court of Appeals followed the law of Alabama insofar as such law bore upon the rights of the parties to the litigation, but in respect to the question involving the function of the District Court, in considering the motion for a directed verdict, followed the practice prevailing in the Federal courts.

Decision and Order Below Not in Violation of Petitioner's Rights.

The petitioner insists that the Court of Appeals was wrong in holding that the evidence would not support a verdict in her favor, and that the further action of the Court in ordering a judgment entered for the defendant was in violation of the Seventh Amendment. We shall undertake to answer both of these contentions, without discussing at length the facts relied upon by petitioner as establishing authority of the agent to make the oral agreement.

The facts relied upon by petitioner as establishing substantial evidence that Musgrove had authority of a general agent were analyzed by the Court of Appeals, and the conclusion reached that there was no substantial evidence supporting the verdict. The fact that the Court of Appeals applied the law of Alabama is shown by the following excerpt from the opinion:

> "We state at the outset that the test to determine whether a general agency exists, in both Alabama case law and in general insurance law, is whether the agent 'has the power to bind the insurer by his contract of insurance, or to issue policies on his own initiative, or to accept risks, and if the agent has actual authority to do these things he is a general agent'; he may then bind the company in other ways, such as by oral contract, by waiving certain policy or application provisions and the like," 266 F. 2d 276, 277.

In the Petition, it is insisted that Musgrove's testimony to the effect that Holland stated in a telephone conversation that Musgrove would be a "full agent for the aviation accident division, special risk, department" (R. 202), is substantial evidence that Musgrove was a general agent of respondent at the time of the making of the alleged oral agreement. In the opinion of the Court of Appeals, it is pointed out that this conversation took place prior to the issuance to Musgrove of a license by the State Department of Insurance, and that the term "full agent" can only be reasonably construed as bringing into existence the status of principal and agent; or employer and employee, not as conferring general agency powers upon Musgrove. The Court of Appeals observed that this was petitioner's (appellee's) strongest evidence. At the time of the conversation between Holland and Musgrove the latter might be considered as having had some informal brokerage ar-

rangement with Continental, but his status as an agent did not come into being until the issuance of the license some three months later.

In the Petition, at pages 22-23, the Court of Appeals is criticized for its treatment of the evidentiary effect of the information on the license issued by the State of Alabama. An examination of the Alabama cases cited by the Court of Appeals will disclose that the Court of Appeals reached the same conclusion that would have been reached by the Supreme Court of Alabama.

Other phases of the evidence are referred to in the Petition, but the foregoing discussion is sufficient to point out that the Court of Appeals reached sound conclusions in considering the evidence relating to the question whether Musgrove had authority to change or extend the provisions of the policy.

The case of **Guaranty Trust Co. v. York**, 326 U. S. 99, is cited by petitioner in support of the argument that she should not be deprived of her judgment because of "the fortuitous circumstances of residence out of a State of one of the parties." It will be recalled that in the York case, this Court held that a Federal court, sitting in the State of New York, should not entertain an action which was barred by the statute of limitations of such state. Certainly no support for the petitioner's position can be found in the York case.

The basic question presented by the Petition is whether the judge-jury relationship in Federal courts, sitting in cases involving citizens of Alabama, is to be so disrupted as to prevent such courts from bringing litigation to a conclusion in an expeditious manner as allowed by Rule 50 (b), where the court concludes, as a matter of law, that a judgment against the party moving for a directed verdict could not stand.

Although the facts and questions presented in the recent case of **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525, were different from the facts and questions presented in this cause, the position of the respondent is supported by what was said in that case. We quote therefrom as follows:

> "We think that in the circumstances of this case the Federal court should not follow the state rule. It cannot be gainsaid that there is a strong Federal policy against allowing state rules to disrupt the judge-jury relationship in the Federal courts." 356 U. S. 538.

In the Byrd case, the Court referred to the case of **Herron v. Southern Pacific Co.**, 283 U. S. 91, having been decided prior to **Erie R. Co. v. Tompkins**, 304 U. S. 64, but the Court very clearly indicated approval of the decision in the Herron case to the effect that the District Court for Arizona was not bound by a provision of the Arizona Constitution relating to the submission of certain issues to the jury, and that the discharge of the judicial function (in directing a verdict for the defendant) "is an essential factor in the process for which the Federal Constitution provides." 283 U. S. 95.

In **Montgomery Ward & Co. v. Duncan**, 311 U. S. 243, the Court gave consideration to Rule 50 (b) and pointed out that "the rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other." 231 U. S. 250. The Court stated further, "Prior to the adoption of the rule, in order to accomplish this, it was necessary for the court to reserve the question of law raised by a motion to direct a verdict. The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution." 231 U. S. 250.

With reference to the procedure to be followed by the appellate court, this Court in the Montgomery Ward case, stated the following:

> "The appellate court may reverse the former action and itself enter judgment n. o. v. or it may reverse and remand for a new trial for errors of law." 311 U. S. 254.

The Court further stated that "the courts should so administer the rule as to accomplish all that is permissible under its terms." 231 U. S. 253.

In **Galloway v. United States**, 319 U. S. 372, the Court stated:

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50." 319 U. S. 389.

In the Galloway case the Court also stated:

> "Furthermore, the argument from history is not convincing. It is not that 'the rules of the common law' in 1791 deprived trial courts of power to withdraw cases from the jury, because not made out, or appellate courts of power to review such determinations. The jury was not absolute master of fact in 1791." 319 U. S. 389, 390.

Although some diversity of opinion is indicated in the earlier decisions in respect to the authority of a court of appeals to direct the entry of a judgment on account of insufficient evidence to support a verdict returned in the district court, where the question was not presented by

or reserved under a motion for a directed verdict, it is now well established under the decisions of this Court that a court of appeals may either direct the entry of a judgment notwithstanding the verdict or may reverse and remand for a new trial in the district court.

The decisions of this Court in Herron v. Southern Pacific Company and in Byrd v. Blue Ridge Cooperative show that there is a strong and compelling reason for holding that there should be a uniform rule governing the judicial function and the jury function under the Seventh Amendment of the Constitution, overriding the reasons sometimes given in the decisions that the state law, in diversity cases, should be applied to the extent of insuring that the outcome of a particular case should be the same in a Federal court as in a state court.

The decision in the Herron case still stands unaffected by the decision in Erie RR. Co. v. Tompkins, which, in construing what is now Section 1652 of Title 28, U. S. C. A. (formerly Section 725), changed only the rule formerly obtaining (Swift v. Tyson) to the effect that a Federal court was not bound to follow state decisions, in diversity cases, in determining general common law rules unaffected by statutes.

CONCLUSION.

In the foregoing the respondent has pointed out that no question is presented which justifies a review by this Court of the voluminous printed record and numerous original exhibits considered by the Court of Appeals in reaching the conclusion that this litigation should be terminated by a judgment in favor of the respondent.

The opinion of the Court of Appeals was written by the member thereof most familiar with the substantive law of Alabama. The heavily committed time of this Court would

not permit a more careful and painstaking review of the evidence than that indicated by the opinion of the court below.

The attorneys for petitioner urge some action by this Court which would result in the consideration of certain questions not presented below and, which, if considered, might not have changed the result.

The Petition amounts to an insistence that Federal courts, sitting in diversity cases involving substantive law of Alabama, cannot follow the procedure provided for by Rule 50 (b), and that such litigation cannot be terminated except through jury verdicts.

For the reasons presented hereinabove, it is respectfully insisted that the Petition should be denied.

Respectfully submitted,

.....

REID B. BARNES,
Exchange Security Bank Building,
Birmingham, Alabama,
Counsel for Respondent Continental Casualty Company.

JAMES A. SIMPSON,
WILLIAM L. CLARK,
LANGE, SIMPSON, ROBINSON & SOMERVILLE,
Of Counsel.

Certificate.

I hereby certify that true copies of the foregoing brief have been served upon Messrs. Truman M. Hobbs and Francis H. Hare, attorneys of record for petitioner, and I further certify that a true copy thereof has been served

upon Messrs. Mitchell & Poellnitz, attorneys of record for respondents, Musgrove Insurance Agency, a partnership composed of W. T. Musgrove and W. R. Cadenhead, and W. T. Musgrove and W. R. Cadenhead, individually.

This the ..... day of September, 1959.

.....

Reid B. Barnes,
Of Counsel for Respondent, Continental Casualty Company.

APPENDIX A.

Acts of Alabama, Regular Session, 1953, Volume 1, Act Number 193, pages 247-260, adopting uniform individual accident and sickness policy provisions, requires the following:

"(1) A provision as follows: Entire Contract; Changes: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the insurer and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions."

Title 28, Section 66, Code of Alabama of 1940, provides as follows:

"Sec. 66. Agents to be licensed; certificate.—Insurance companies not incorporated by the laws of the State of Alabama, but legally authorized to do business in this state, through regularly commissioned and licensed agents located in this state, shall not make contracts of insurance on life or property herein save through agents of such companies regularly commissioned and licensed to write policies of insurance in Alabama; but this chapter shall not apply to fire insurance companies covering actual property of railroad companies engaged in interstate commerce. Every insurance company licensed to do business in this state under the provisions of this chapter, shall obtain from the superintendent of insurance a certificate of authority for every individual agent writing or soliciting insurance for it in this state, and such certificate shall be renewable in January of each year."